IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA10/15

In the matter between:

MONDE CHRIS SATANI **Appellant**

an

DEPARTMENT OF EDUCATION, WESTERN CAPE **First Respondent**

MS B GOLDMAN *N.O* **Second Respondent**

EDUCATION LABOUR RELATIONS COUNCIL **Third Respondent**

Heard: 23 February 2016

Delivered: 13 June 2016

Summary: Practice and Procedure – reasonable apprehension of bias - Commissioners are enjoined to conduct arbitration in a manner that they deem appropriate – they might adopt an adversarial or inquisitorial approach but must guard against an intervention that is likely to suggest bias or a perception of bias in favour of a particular party to the dispute. Commissioners must refrain from assisting a party to the detriment of the other, cross-examining witnesses by *inter alia*, challenging the consistency of a witness, expressing doubt about the credibility and reliability of a witness – in *casu the* record is replete with instances where commissioner's intervention advances employer's case to the detriment of the employee - failure to object by a party or its legal representative cannot render an unfair process or conduct fair or acceptable - test for reasonable apprehension of bias not premised on whether the representative objected to the process. Test an

objective one which is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the commissioner has not brought an impartial mind to bear in the adjudication of the dispute. Labour Court's judgment set aside and award remitted to be heard *de novo*, if need be.

Coram: Waglay JP, Tlaletsi DJP *et* Murphy AJA

JUDGMENT

TLALETSI DJP

[1] The appellant, a teacher at Bardale Primary School, was accused by his employer, the Department of Education, Western Cape (the respondent) of behaving in an improper and unbecoming manner towards a female learner (the learner). He was subjected to a disciplinary enquiry where he was found guilty despite his denial of the allegations against him. His internal appeal was also not successful and his conviction and sanction of a final written warning and a fine of R6000-00 payable over a period of 12 months was confirmed.

[2] Aggrieved by his conviction and sanction, the appellant referred a dispute to the third respondent (the Bargaining Council) claiming that in finding him guilty of misconduct and imposing a sanction, the respondent had committed an unfair labour practice for the purpose of s 186(2)(b) of the Labour Relations Act 66 of 1995 (the LRA).

[3] The dispute which could not be resolved through conciliation was arbitrated by the second respondent, an arbitrator acting under the auspices of the Bargaining Council, who found that the appellant was guilty of the misconduct allegations against him and that the sanction imposed was appropriate. In short, she found that the respondent did not commit an unfair labour practice.

[4] The appellant, once again aggrieved, but this time by the decision of the arbitrator, launched review proceedings in the Labour Court contending that the arbitrator committed misconduct in relation to her duties as an arbitrator because her conduct gave rise to a reasonable apprehension of bias and

secondly, that the arbitrator was guilty of a gross irregularity because she reached a decision that no reasonable commissioner could have reached on the evidence properly placed before her.

[5] The Labour Court, per Steenkamp J, found that despite the arbitrator adopting an overly inquisitorial approach in the conduct of the arbitration, her conduct was not sufficient to give rise to a reasonable apprehension of bias. Furthermore, that on a holistic conspectus of the evidence presented at the arbitration, the decision was not one that a reasonable commissioner could not reach and dismissed the review without making any order as to costs.

[6] The appellant is now appealing against the decision of the Labour Court with leave of that court.

[7] What follows is a factual background that led to the dispute which has been extracted from the record without analysing any contradictions, probabilities and reliability of the versions of the parties, because of the view I ultimately take of the matter. The appellant was on 5 February issued with a notice to answer the following charges:

> 'Charge 1: It is alleged that you are guilty of misconduct in terms of section 18 (1) g of the Employment of the Educator's Act 76 of 1998 (the Act) in that during the third term of 2012, you behaved badly in an improper and unbecoming manner towards learner A, a learner at Bardale Primary School:
>
> - By asking her for her cell phone number and/or
> - By asking if you could meet and talk to her and/or
> - By suggesting that she meets you in a forest or bush and/or
> - By asking her if she had a boyfriend.'

The second charge has been omitted because it was dropped prior to the disciplinary hearing.

[8] The learner was a grade 6 13 year old who was among other learners who did poorly in Mathematics and English. During September or October 2012, the

appellant who was the class teacher (but not the subject teacher for these subjects) called them to his desk to discuss their marks. According to the learner, the appellant called them individually to his desk. It must be noted at this stage that the appellant's version was that he called them as a group to his desk. According to the learner, the appellant asked her if she knew that she was beautiful, and asked for her cellular phone numbers.

[9] She claimed that the next day the appellant called her again to his desk and asked her for her cellular phone numbers again. He further asked her whether she had a boyfriend, if she went out walking at night and if she would meet him in the bush. She refused to give him her cellular phone numbers. On both occasions, the incident happened in class where there were other learners.

[10] The learner reported the incident to another learner as well as to her aunt with whom she was staying. The aunt in turn reported what she was told to the school principal. The latter called all the affected parties to her office. The appellant denied the incident. He mentioned that he only asked the learner for her mother's telephone number in order to discuss poor marks in the affected subjects.

[11] The learner's aunt, the school principal and another learner testified about the reports she made to them respectively. There were however, some discrepancies on the actual report to them. The appellant, in addition to his evidence called two other learners as witnesses. The tenor of their testimony was that the appellant called the leaners as a group to his desk and not individually.

[12] In a nutshell, the commissioner concluded that the evidence of the appellant and his witnesses was not credible as opposed to that of the learner and her witnesses, that the appellant was guilty of the misconduct complaint and that the sanction imposed did not constitute an unfair labour practice.

[13] Section 138[1] of the Act empowers the commissioners of the Commission for Conciliation, Mediation and Arbitration (CCMA), including the Bargaining Council to conduct arbitrations under the LRA in a manner they consider appropriate in order to determine the dispute fairly and quickly. They are however, enjoined to deal with the substantial merits of the dispute with the minimum of legal formalities. The commissioners are given the discretion to decide the appropriate form of the proceedings and the rights conferred upon a party in terms of s138(2) are subject to the overriding discretion conferred on the commissioners.

[14] Conducting proceedings "*with the minimum of legal formalities*" suggests that arbitration proceedings are not a court of law and do not follow a system of binding precedents. Their proceedings are strictly speaking not required to mimic rules and procedures adopted in courts of law. To this end, the commissioner has a discretion to elect among others, an inquisitorial or adversarial approach in conducting arbitration proceedings. Such a choice, in my view, should be dictated by the nature of the dispute, the parties to the dispute as well as all other factors that might be relevant in order to achieve the goal of dealing with the substantial merits of the dispute fairly, even-handedly, quickly and with minimum of legal formalities.

[15] In *CUSA v Tao Ying Metal Industries and Others,*[2] the following was said about s138:

> '…64.*Consistent with the objectives of the LRA, commissioners are required to "deal with the substantial merits of the dispute with the minimum of legal formalities." This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA*

[1] *Sec* 138(1) *The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.*
(2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner.
[2] [2009] 1 BLLR 1 ((CC); (2008) 29 ILJ 2461 (CC); 2009(9) BCLR 1 (CC).

> *permits commissioners to "conduct the arbitration in a manner that the commissioner considers appropriate". But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.'*[3] [Footnotes omitted]

[16] Where an arbitrator adopts an inquisitorial approach, he/she does not have the right to abandon the well-established rules of natural justice. The rules of natural justice are instruments that commissioners should have in their mind when adopting an inquisitive approach. The rules of natural justice dictate that parties be afforded a fair and unbiased hearing, which consists of hearing both sides in an impartial manner. This rule finds expression in the *audi alteram partem* which is concerned with affording parties an opportunity to participate in the decision that will affect them. The participation of parties in proceedings not only improves the quality and rationality of the decision but also enhances the legitimacy of the decision. The *audi alteram partem* rule implies equal participation of parties during the proceedings. He/she must hear both sides; act impartially and consistently to both parties irrespective of the approach adopted.[4]

[17] A party appearing before a commissioner has a right to and expects a hearing that is fair. The Constitutional Court had the following to say about fairness in arbitration proceedings:

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[3] At para 64.

[4] In *County Fair Foods (Pty) LTD v Theron NO and Others* (2000) 21 ILJ 2649 (LC, the following was said.

"7…The basic standards of proper conduct for an arbitrator are to be found in the principles of natural justice, and in particular the obligation to afford the parties a fair and unbiased hearing. (See Baxter Administrative Law at 536). These principles have been reinforced by the constitutional imperatives regarding fair administrative action. (See *Carephone (Pty) Ltd v Marcus NO* (1998) 19 ILJ 1425 (LAC) at 1431I-1432A.) The core requirements of natural justice are the need to hear both sides (*audi alteram partem*) and the impartiality of the decision-maker (*nemo iudex in sua causa*). (See Baxter (supra) at 536.).

8. It follows from the above principles that a Commissioner must conduct the proceedings before him in a fair, consistent and even-handed manner. This means that he must not assist, or be seen to assist, one party to the detriment of the other. Therefore, even though a Commissioner has the power to conduct arbitration proceedings in a manner that the Commissioner considers appropriate in order to determine the dispute fairly and quickly under the provisions of section 138(1) of the Act, this does not give him the power to depart from the principles of natural justice. Thus, further, although it clearly lies within the Commissioner's powers to decide whether to adopt an inquisitorial or adversarial mode of fact finding, once this decision has been made it ought to be consistently applied to both parties."

'*266.The requirement of fairness in the conduct of arbitration proceedings is consistent with the LRA and the Constitution. First, a CCMA commissioner is required by section 138(1) of the LRA "to determine the dispute fairly and quickly". Second, in terms of section 34 of the Constitution, everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court of law or an independent and impartial tribunal. The CCMA and Labour Courts were established to resolve labour disputes. CCMA arbitrations provide independent and impartial tribunals contemplated in section 34 of the Constitution. The right to a fair hearing before a tribunal lies at the heart of the rule of law. And a fair hearing before a tribunal is a prerequisite for an order against an individual and this is fundamental to a just and credible legal order. A tribunal like the CCMA is obliged to ensure that the proceedings before it are always fair. And finally, section 23 of the Constitution guarantees to everyone the right to fair labour practices.*

267.It is plain from these constitutional and statutory provisions that CCMA arbitration proceedings should be conducted in a fair manner. The parties to a CCMA arbitration must be afforded a fair trial. Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues.'[5] [Footnotes omitted]

[17] It is accepted that commissioners are not expected to merely sit back and allow the parties to present their cases and not guide them to the real issues that are to be determined. There will be instances where intervention on the part of the commissioner would be necessary, whether an adversarial or

[5] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at paras 266-267.

inquisitorial has been adopted. However, commissioners must guard against an intervention that is likely to suggest bias or a perception of bias in favour of a particular party to the dispute. He/she must refrain from assisting a party to the detriment of the other, cross-examining witnesses by *inter alia*, challenging the consistency of a witness, expressing doubt about the credibility and reliability of a witness; putting leading questions to witnesses; answering questions for witnesses; showing disrespect to the parties' representatives; not allowing representatives to present their cases without undue interference; doubting the capacity of a party's chosen representative to represent a party and appearing to be an expert who knows everything and evincing a mind not open to persuasion. The list is not exhaustive.

[18] The test for a reasonable apprehension of bias which is equally applicable to commissioners was authoritatively illustrated by the Constitutional Court as follows:

> '*[35] A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes*'[6].

And that:

> *'[48] It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case,that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour;] and their ability to carry out that oath*

[6] *President of the Republic of South Africa and Others v SA Rugby Football Union and Others* 1999 (4) SA 147 (CC) at para 35.

by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial'. [7] [Footnotes omitted]

[19] It should not be difficult for commissioners to meet the required standard of fairness and impartiality because they have access to the CCMA Practice and Procedure Manual which provides a useful guide on how to conduct arbitrations and what is expected of the commissioners.

[20] In *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others*,[8] the court took the view that it was duty bound to play a supervisory role over the conduct of commissioners in arbitration proceedings and may thus consider the conduct of a commissioner even if it was not a ground for review. The court however, emphasised that it may only intervene in terms of its supervisory functions, if it is apparent from the record before the court that one of the specific grounds as listed in section 145(2)(a) of the LRA actually exists, as the existence of any one of these three specific considerations must surely be entirely incompatible with any arbitration proceedings that would be considered to be lawful, reasonable and procedurally fair.

[21] The court noted that, although a commissioner may, in terms of section 138(1), conduct arbitration proceedings in any manner he or she deems appropriate, this did not give the commissioner licence to become engaged in the proceedings to such an extent that it appeared that he or she was a representative of one of the parties. For a commissioner to descend into the arena and become an active participant in the conduct of the case for one of the parties, was simply not fair play and completely negated the imperative of

[7] *President of the Republic of South Africa and Others v SA Rugby Football Union and Others* at para 48. .
[8] (2013) 34 ILJ 2347 (LC).

conducting fair arbitration proceedings. In this respect, the court held that the manner in which the commissioner conducted herself in the proceedings creates the perception that she was firmly in favour of finding for the employee and that it created a perception of bias.

[22] In *Raswiswi v CCMA and Others*,[9] the Labour Court came to a similar conclusion about the conduct of the arbitrator during the proceedings when the following was said:

> 'This line of questioning directed by the commissioner continues in the same vein, with the applicant's union representative scarcely getting a word in. Apart from the fact that the applicant's representative had only asked one question before the arbitrator launched into his own line of cross-examination, it is clear that the character of his questions to the applicant was very different to the character of the questions he asked the company witnesses. The entire thrust of his questioning was not aimed at elucidating or clarifying the applicant's defence, but at challenging it. Moreover, the arbitrator's questions to the applicant did not follow naturally from an incomplete line of cross-examination initiated by the employer: the arbitrator took the initiative by directly attacking the applicant's defence, while he was still giving evidence in chief.'[10]

[23] The conduct of the same commissioner who arbitrated this dispute was again a subject of consideration by the Labour Court in *Innovation Maven (Pty) LTD v CCMA and Others*[11] where the following observation was made by Van Niekerk J:

> '[17] *In the present instance, in my view, and after a careful perusal of the record, the commissioner's conduct was such that she overstepped the mark. It is difficult to convey the magnitude of the extent to which the commissioner actively engaged in the proceedings, but read as a whole, the transcribed record reflects that the commissioner failed to respect the roles of the parties'*

[9] 2011) 32 ILJ 2186 (LC).
[10] At para 18.
[11] (2016) 37 ILJ 465 (LC).

respective representatives and assumed to herself the role of leading evidence and conducting cross-examination.'[12]

[24] Unfortunately, the same observations are applicable in this case. The record is replete with instances where the commissioner took over the presentation of the case by leading evidence and not recognising the role of the parties' representatives. She regularly interfered in the appellant's examination of the respondent's witnesses; allowed the respondent's representative to interject and interrupt the course of questioning by the appellant's representative; expressed scepticism regarding certain evidence adduced or to be adduced by the appellant, prematurely expressed views about appellant's conduct about the incident; solicited hearsay and similar fact evidence relating to other learners who had been allegedly approached by the appellant and appeared to be assisting the respondent's representative to the detriment of the appellant.

[25] A few examples of instances referred to above will suffice; otherwise traversing each and every instance of inappropriate intervention will require me to rewrite the entire record or attach the entire transcript of the arbitration proceedings to this judgment.

[26] It is remarkable to note that after the learner was sworn in, the arbitrator took over the examination in chief in its entirety. In fairness to the respondent's representative (Mr Vorster), he tried his best but found it difficult to wrestle the process from the arbitrator and lead evidence in chief as required. He in most cases had to ask "*Can I come in here Ma'am*", "*Can I …*". The arbitrator would reply "*Mm…*" Mr Vorster would ask one question and the arbitrator would immediately take over and run with the leading of evidence. At one occasion Mr Vorster appeared to be pleading with the arbitrator by saying *"Ma'am, can I just come in?*" and she replied, "*Hold on*". In this process, the arbitrator went at length to illicit hearsay evidence from the learner about another learner on a misconduct allegation that had been withdrawn, running into several pages of the record.

[12] At para 17.

[27] The questioning by the arbitrator led her again to extract hearsay evidence about another learner who was not going to be called as a witness and had never been interviewed by the respondent. This incident seems to have annoyed Mr Vorster who complained that his witness was being confused by matters not relevant to the dispute. The following altercation ensued between the arbitrator and the representative, Mr Vorster:

> '*Mr Vorster: Commissioner, no, she mentioned Sibulele's name and you asked her who Sibulele is. And that's why she explained. She didn't actually state that Sibulele- at first she didn't state that Sibulele went through the same thing as them. You asked her, that's how it came out.*
>
> *Commissioner: No, I asked her- she mentioned Sibulele in the question Mr Satani said, one of the questions he asked her, how far she live from her.*
>
> *Mr Vorster: Yes.*
>
> *Commissioner: So that's why I mentioned who she was. I didn't know that Sibulele suffered the same fate, if you like.*
>
> *Mr Vorster: Yes. But you mentioned now that why did she only, almost like why does she bring this up now only. She didn't want to bring it up- you were asking her.*
>
> *Commissioner: No, but I just asked her who she was. I didn't know she was going to bring this up.*
>
> *Mr Vorster: Oh.*
>
> *Commissioner: I didn't ask her- I didn't know that she was going to- I just thought she was going to say she was living near me.*
>
> *Mr Vorster: No, I'm just (indistinct).*
>
> *Commissioner: Ja, but I didn't know she was going to bring this up.*
>
> *Mr Vorster: Yes. Okay. You asked her just now why now, why now only*.'

What the arbitrator seems to have overlooked is a warning that never ask a party's witness a question to which you do not know an answer. Had she

allowed the representative to lead his witness the above situation would have been avoided. To try and save the situation the following line of questioning ensued:

> 'Commissioner: Okay. So if you say that she- after the Principal – after the Principal, she said she was (indistinct), did you tell the investigating person, who was it – Ms Allen?
>
> Mr Vorster: Janice Elliott.
>
> Commissioner: Yes- Ms Elliott. Did you tell Ms Elliott about Sibulele?
>
> [Learner]: Yes.
>
> Commissioner: That's why you could have a look if the investigating report says that. So you told Ms Elliott about Sibulele? Sorry- do you know who Ms Elliott is before we go any further?
>
> [Learner]: Yes. That person that (indistinct) there at the school.
>
> Commissioner: Yes. She was the person investigating and asked you about all this from the Department.'

In conclusion, the arbitrator enquired from the Learner if she knew of "*anybody else*" that the educator asked for their phone numbers and she replied that she does not know. She further asked if the Learner thinks that Sibulele would come and tell her story and she replied in the positive. The arbitrator then said the following to the representative*: "'it's up to you, Department…..Carry on"*. By asking these questions the arbitrator was undertaking an investigation against the appellant, a role she should avoid as an adjudicator.

[28] The issue of Sibulele and the investigation report did not end there. The arbitrator later during the proceedings engaged the respondent's representative as follows:

> *'Commissioner: But also, what I want to put on record, is I am subpoenaing the investigation report. Was Sibulele in- was she investigated?*

Mr Vorster: No.

Commissioner: Was a statement taken from her?

Mr Vorster: No.

Commissioner: Did the Department know about her?

Mr Vorster: I really don't know. It was never- like I said, you know, I just came here to the arbitration (intervention).

Commissioner: Okay, no, no, well, you read the investigation report, because I don't know how you can do this case if you haven't read it. Have you read the investigation report?

Mr Vorster: No, there is nothing said about Sibulele here.

Commissioner: No. Okay.

Mr Vorster: In the report, investigation report, nothing (intervention).

Commissioner: Okay. So I just want- the investigation report I'm subpoenaing. I want to see the statements of [the Learner] and the statement of Aseza.

Mr Vorster: Okay.

Commissioner: But she has said now that she told the Principal about Sibulele.

Mr Vorster: Ja, because you asked her.

Commissioner: No, no, but she said so! So let's see if says so.

Mr Vorster*: (indistinct) wasn't mentioned in the hearing.*

Commissioner: No. But it was mentioned in the- she told the principal about it, and the Principal should have told the investigator. We'll see what the Principal says.'

It is clear from this altercation that the arbitrator was sharing her knowledge and experience of the investigation processes at the appellant and also gives instructions on the documentary evidence she wants. The manner in which

she did it was clearly to descend into the arena reserved to the parties to the dispute and leaving the appellant with no doubt that she was partial. It is worth noting that on the subsequent hearing of the arbitration, Mr Vorster was replaced by Mr Clayton. The reasons for the reshuffle are not disclosed. It is however notable that Mr Clayton also took issue with the arbitrator for concentrating on issues relating to a charge that the appellant was not facing which appeared to be confusing the witness. In response, the commissioner mentioned that such issues had to do with credibility and that he could address her in his closing argument about what he perceived to be contradictions.

[29] Just before the cross-examination of the Learner commenced, the arbitrator explained the following to the Learner: "…*what is going to happen now, you can take a little break. Mr Satani's lawyers are going to ask you questions, okay? Their job, obviously, is to tell you that your evidence is not true. Okay? So they won't ask you very nice questions, maybe. But that's the way the process goes. Okay? Do you understand what I'm saying?"* This explanation is obviously incorrect with regard to the process and purpose of cross-examination. It has the potential of either scaring a witness or making her hostile towards the representative. A proper explanation as to the purpose and the process of cross-examination would have cleared any doubt of bias on the part of the arbitrator.

[30] In the course of the Learner's cross-examination, the arbitrator turned to the appellant who had not taken the oath as he was not yet called to testify and the following ensued:

> '*Commissioner: Then wasn't it fair that you- you should have found the mother's number some other way. Why you are you just calling- did you call Dumisani's mother?*
>
> *Mr Satani: They were fighting.*
>
> *Commissioner: I understand but did you call Dumisani's mother?*
>
> *Mr Satani: Yes ma'am. I called Dumisani's mother and [Learner's] mother.*

Commissioner: How did you get hold of her?

Mr Santani: which one? [Learner]?

Commissioner: Yes.

Mr Santani: Dumisani's number. Dumisani gave me his parent's number, then I take that number and I went to the staff room and I called his mother.

Commissioner: Yes, but how did you call the [Learner's} mother?

Mr Santani: I didn't call her mother'

Commissioner: But it's not very fair to call Dumisani's mother and she had started the fight.

Mr Santani: What I am saying is they were fighting. Now I wanted to solve that.

Commissioner: I understand, but you don't call the person who started the fight's mother. What is the point?

Mr Santani: The point is that they were fighting there and I was… (intervention).

Commissioner: I understand all that, I've got you. But now you call the boy who didn't start the fight's mother. What was the point?

Mr Santani: No I wanted to… (intervention).

Commissioner: I know what you wanted to do but you called Dumisani's mother' who didn't even start the fight.

Mr Santani: the reason that I – I just wanted to call both parents.

Commissioner: yes I know but you didn't call her mother, so what the point?

Mr Santani: I did't get the number.

Commissioner: So why didn't you get from the principal?

Mr Santani: The principal doesn't have.

Commissioner: So what's the point of calling Dumesani's mother? I don't understand.

Mr Santani: I said both of them, they must give…(intervention).

Commissioner: Yes but they didn't, so what was the point of calling Dumesani's mother? You are not understanding my question. Am I being…. I understand you've got two children of the fighting, one of them started the fight, so you call his mother but not her mother, and she started the fight. What's the point?

Mr Santani: they give me numbers, then only Dumisani gave me the number and I said "I am going to call your mother" and I asked the [Learner] to bring the number.

Commissioner: She didn't.

Mr Santani: She didn't. Then I called her mother, Dumisani's mother, to say that she must came.

Commissioner: So she came, so what did you tell her? Somebody else started the fight.

Mr Santani: She came to school and I said that there was a fight and I was waiting for [the Learner's mother].

Commissioner: So between July and- you have this child in your class and you don't have the number for them but you don't get the number. Okay fine.

Mr Santani: That's is why ma'am, (indistinct) the principal said we must get numbers. That's because there was no information.

Commissioner: Okay well we'll get there. We'll ask the principal all that…'

The above cross-examination was a warning shot of what to expect during the appellant's actual cross-examination. Same was also characterised by interjections and interruptions.

[31] It needs to be mentioned, for fear of burdening this judgment with excerpts from the record, that the Learner's cross-examination was marred by the arbitrator's intervention as well. She dominated the process by taking over the

questions asked and in the result diluted the essence of the questions. It is fair to say that the representative asked far fewer questions than the arbitrator. She, in one instance, insisted that appellant's representative explains the appellant's case and the relevance of a document. She allowed uncontrolled interjections by the respondent's representative during the cross-examination of the Learner and repeatedly repeated her evidence when cross-examined.

[32] At the conclusion of cross-examination of the Learner, appellant's representative was not satisfied with the arbitrator independently calling for statements of witnesses and people not called as witnesses. He was also concerned as to how those statements are going to be dealt with and to be part of the arbitration. The arbitrator's response was simply:

> *'Use it for what they are. You can't cross-examine them. I just asked for them. You are not going to deal with them in any way. I'll just deal with them and give the weight to the evidence that I want to. You are not going to, we are not going to cross-examine them, so it…*'

What is conveyed by this response is not entirely clear. However, if the arbitrator means that she will alone decide on what weight to attach to those statements without the parties being afforded an opportunity to test them through cross-examination, is not only surprising but a gross irregularity.

[33] Generally, the process adopted by the arbitrator in conducting the arbitration appears to have been an unbalanced one, leaning in favour of the respondent. The transcript reveals that the respondent benefited from advice by the arbitrator to its representative to call the principal to testify; that he should check the transcripts of the disciplinary hearing to see whether the appellant's evidence was consistent; that he might need Subulele's evidence to address some of the difficulties in his case which were pointed out by the arbitrator; that he should also call more witnesses to address ether difficulties he was facing; indicating scepticism regarding certain of the evidence adduced or to be adduced by the appellant; and displaying sympathy with the Learner. Furthermore the arbitrator took over the questioning of one Khabisile who was the appellant's witness thereby depriving the appellant's

representative of a proper opportunity to examine the witness and to tender the evidence they wished to place on record.

[34] The difficulties pointed above are not isolated incidents that are drawn out of context. They are to be found throughout the entire transcript of the proceedings. In my view, the Labour Court was too conservative to conclude that she came close to overstepping the mark, but she did not. In my view, a case of overstepping the mark that is clearer than this one is rare to find. To contend that the arbitrator was trying to "*smooth the pitch*" because Mr Vorster was doing his first arbitration and appellant was represented by an attorney is in the circumstances of this case without merit. Firstly, there was never an inquiry as to the background and qualifications of Mr Vorster. Secondly, she never informed the parties about the role she would play to obtain their views. Thirdly, the very Mr Vorster who never indicated that he wanted playing field to be levelled, was unimpressed by the conduct of the arbitrator. The record does not even suggest that he was incapable of representing the respondent. In any case, she overstepped the fine line between legitimate intervention and assistance, amounting to advancing one party's case at the expense of the other. Although she intervened when the respondent's representatives were also questioning the witnesses, her intervention had the result of benefitting the respondent. To think that in the circumstances the arbitrator was trying to assist for the sake of fairness is not borne by the facts and is speculative.

[35] The Labour Court held that appellant's attorney neither objected to the style with which the arbitrator conducted the arbitration nor did he ask for her recusal. Failure to object by a party or its legal representative cannot render an unfair process or conduct fair or acceptable. The test for reasonable apprehension of bias is not premised on whether the representative objected to the process or not. It is an objective test which is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the commissioner has not brought an impartial mind to bear in the adjudication of the dispute. In any case, it has been shown above that an attempt by the respondent's representative to stop the arbitrator from her conduct failed to yield any positive results.

[36] In my view, the award must be reviewed and set aside because the scope, nature and effect of the arbitrator's interventions and dominance were such that she failed to afford the parties a fair hearing. Her conduct gave rise to a reasonable apprehension of bias.

[37] In *Herholdt v Nedbank Ltd,*[13] the Supreme Court of appeal had the following to say about the review of arbitration awards:

> '*After Sidumo the position in regard to reviews of CCMA arbitration awards should have been clear. Reviews could be brought on the unreasonableness test laid down by the Constitutional Court and the specific grounds set out in ss 145(2)(a) and (b) of the LRA. The latter had not been extinguished by the Constitutional Court but were to be 'suffused' with the constitutional standard of reasonableness.* ***What this meant simply is that a 'gross irregularity in the conduct of the arbitration proceedings' as envisaged by s 145(2)(a)(ii) of the LRA, was not confined to a situation where the arbitrator misconceives the nature of the enquiry, but extended to those instances where the result was unreasonable in the sense explained in that case****. Beyond that there was no reason to think that their meaning had been significantly altered provided they were viewed in the light of the constitutional guarantee of fair labour practices.'* [Emphasis provided]

And further that:

> '*In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry* ***or*** *arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'* [Emphasis provided]

[13] 2013 (6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA) at paras 14 and 25

[38] Mr O'Brein who appeared on behalf of the responded correctly conceded that the interventions by the arbitrator cannot be defended. He went further to state that the record made a painful read. He however urged us to consider whether the reasonableness of the arbitrator on the record as it stands. In *casu*, the arbitrator committed a gross irregularity in that she misconceived the nature of the inquiry such that the parties were denied a fair hearing. The outcome of her award is therefore irrelevant because there is no material that can be said to be properly before the arbitrator to determine whether the outcome is reasonable. The entire proceedings have been tainted hence the conclusion that the parties have been denied a fair trial. I therefore find no merit in Mr Bosch's submission that we should substitute the award with a finding that the respondent committed an unfair labour practice. It would be appropriate under the circumstances to refer the matter back and if need be, be arbitrated *de novo* but before a different arbitrator. It would be according to the requirements of the law and fairness that each party carry its own costs.

[39] In the result, the following order is made:

a. The arbitration award issued by the second respondent on 4 March 2014 is reviewed and set aside.

b. The matter is remitted to the third respondent for, if need be, a fresh hearing before a commissioner other than the second respondent.

c. There is no order as to costs.

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Tlaletsi DJP

Waglay JP and Murphy AJA concur in the judgment of Tlaletsi DJP.

APPEARANCES:

FOR THE APPELLANT: CS Bosch

Instructed by M Funeka Attorneys

FOR THE RESPONDENT:

Instructed by The State Attorney